In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-8611

BANCROFT MANUFACTURING COMPANY, INC., et al.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Bancroft Manufacturing Co., Inc., *et al.*, Petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 23, 1975, granting enforcement of an order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, pp. A1-A20) is reported at ..... F2d ..... The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported at 210 NLRB #90 (App., infra, pp. A21-A60).

JURISDICTION

The decision of the Court of Appeals was rendered on July 23, 1975 (App., infra, pp. A1-A20). The court's mandate issued October 20, 1975, after a denial on Petitioner's Motion for Rehearing (App., infra, p. A61). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and §10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e) and (f).

QUESTION PRESENTED

Should a National Labor Relations Board conducted election be set aside where a party to the election injects racial propaganda into the campaign and fails to establish that such statements were truthful and germane; or should the election be set aside only if the untruthful propaganda is racially inflammatory?

STATUTES INVOLVED

The National Labor Relations Act, as amended, 29 U.S.C. §141 et seq., insofar as is here pertinent, provides:

> §7. Employees shall have the right to self-organization, to form, join, or to assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

> §9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .
>
> §9(b). The Board shall decide in each case whether, in order to insure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for purposes of collective bargaining shall be the employer unit . . .

STATEMENT OF THE CASE

Bancroft Manufacturing Company, Inc., Petitioner herein, is engaged in the production of various aluminum products at three plants located near McComb, Mississippi. On July 1, 1971, an election was held, conducted by the National Labor Relations Board, concerning the representative status of the Southern Council of Industrial Workers United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union) as the collective bargaining agent of the employees of Petitioner. A majority of the ballots were cast for the Union. Petitioner filed timely objections to the election asserting *inter alia* that the Union's injection of racially inflammatory statements into its campaign destroyed the prerequisite "laboratory conditions" essential to a free election. The National Labor Relations Board dismissed Petitioner's objections and certified the Union as the collective bargaining representative. Thereafter, the Petitioner refused to negotiate with the Union in order to test the validity of the Board's certification in the Courts (App., infra, pp. A1-A2).

Forty-three per cent of the company's employees at the time of the election were black. Thus, much of the union's organization effort was devoted to an appeal to the black employees. In the course of this appeal, union organizer, Sylvester Hicks, told black employees on several occasions at union meetings and to individuals, that "if the blacks did not stay together as a group, and the union lost the election, all the blacks would be fired." Regarding lay-offs, Hicks told the employees that "seemingly, the trend was . . . that the blacks were going to be laid off if they didn't stick together and try to get the plant organized to where they would have some protection . . ." On another occasion, at a union meeting, Hicks called upon Rev. Harry Buie to assist in the campaign. At this meeting, Buie commented that "it had been called to his attention that an employee was to be given a car to swing the black vote. He understood that he was a soul brother, and the part that hurt him so bad was that it would be a sold-out soul brother." These comments by the union organizer and his agent to the black employees during the course of the campaign constituted the basis upon which, among other things, the Petitioner filed its objections to the election (App., infra, pp. A3-A4, A30-A31).

THE BOARD'S DECISION AND ORDER

The Board panel majority, over the vigorous dissent of Chairman Miller, affirmed the decision of the Administrative Law Judge and adopted his recommended order (App., infra, pp. A21-A28). The Administrative Law Judge found, and the panel majority agreed, that the aforementioned remarks were unimportant and not unreasonable under the circumstances. They further found that even

if the remarks were untrue, they had an insignificant influence on the results of the election (App., infra, pp. A4, A23-A26). On the other hand, the dissent, citing the Board's decision in *Sewell Manufacturing Company*, 138 NLRB 66, pointed to the fact that the union did not carry forth its burden of proof in establishing that the racial assertions were truthful and germane to the election (App., infra, pp. A29-A32).

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, in enforcing the Board's Order, although holding that the remarks were totally untrue (App., infra, pp. A8-A9) went on to hold that there was substantial evidence to support the Board's finding ". . . that the disputed statements did not so taint the campaign with racial passion as to make a fair election impossible" (App., infra, p. A9). The Court further held, in agreement with the Board, that the statements did not have an inflammatory effect on the employees (App., infra, pp. A10-A12).

REASONS FOR GRANTING THE WRIT

This Court, on occasions too numerous to cite, has issued decisions setting forth guidelines for employers, unions, and the government to follow in dealing with racial matters in employment practices. However, this Court has yet to review and set forth guidelines in the important area of employee elections concerning labor relations where racial matters are injected into the campaign. Petitioner submits that when such powerful emotional propaganda as racial prejudice is injected into the campaign,

that this Court should, as in other areas, set forth appropriate guidelines regarding its use. Petitioner submits that the use of such propaganda has the immediate impact of polarizing the employee electorate on the basis of race, rather than germane issues of wages, hours, benefits and working conditions. The Board, in 1962, set forth its views toward the use of such propaganda in election campaigns, and set out criterion applicable to the use of such propaganda. *Sewell Manufacturing Company*, 138 NLRB 66 (App., infra, pp. A29-A30). In that case, the Board refused to place racial statements into the same category with other types of campaign propaganda and established a standard different from the test concerning statements of misrepresentations concerning wages, hours and working conditions. (See *Hollywood Ceramics*, 140 NLRB 221, 1962; summarized in the Court's opinion at App., infra, p. A11). Concerning the use of racial propaganda, the Board held that ". . . the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him." (138 NLRB 72; App., infra, p. A30). As the Board said, "We would be less than realistic if we did not recognize that such statements, even when moderate and truthful, did not in fact cater to racial prejudice" (App., infra, pp. A30-A31). Thus, it is clear that untrue racial statements injected into a campaign will not be tolerated according to the Board's principle set forth in *Sewell*. The tolerable limits are confined to truthful statements presented in a moderate fashion.

Clearly, the Board and the Court of Appeals have deviated from this principle in the case herein. The Court below established a new test:

> Where racial remarks are injected into an election contest, but did not form the core or theme of the campaign as they did in Sewell, the Court's analysis of their effect should follow a two-step process. First, were the statements racially inflammatory? If they were, then the test for truth and relevancy must be made as Sewell describes. Second, if the remarks were not racially inflammatory, then the statements should be reviewed under the familiar standards applied to any other type of alleged material misrepresentation (App., infra, p. A9).[1]

Thus, this "inflammatory" test is far more complex and difficult to administer than the "truthful and germane" test set forth in *Sewell*. The logical implication of the Court's test would allow subtle falsehoods concerning racial matters to be injected into a campaign even when the Board recognized that even moderate and truthful statements cater to racial prejudice. The essence of the Court's test opens "Pandora's box" on defining "inflammatory." Each situation would necessitate an inquiry not only into the extent of such statements but also into the actual effects upon the employees of such statements. This means the inquiry would require probing into the subjective state of mind of the employees. The Board and the Courts have long held that coercive statements are not to be judged on the actual effect upon the employee, but whether the statement itself had a tendency toward coercion, *Elastic Stop Nut Corp.* v. *N.L.R.B.*, 142 F2d 371 (CA-8, 1944).

Sewell presents a far more objective standard than this. Were the statements truthful and were the statements germane to the issues of wages, hours, and work-

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1. The Court's reference to the second test regard *Hollywood Ceramics*, supra.

ing conditions. And, the burden is on the party making such statements to meet this test.

CONCLUSION

Since racial propaganda injected into an election campaign has a tendency of focusing employees' attention toward racial prejudices and away from the germane issues, it is respectfully submitted that this Honorable Court should grant Certiorari to set forth guidelines in the area of racial propaganda in National Labor Relations Board conducted elections.

Respectfully submitted,

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APPENDIX

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BANCROFT MANUFACTURING COMPANY, INC., and Croft Aluminum Company, Inc., et al., Respondents.

No. 74-3052.

United States Court of Appeals, Fifth Circuit.

July 23, 1975.

Before GOLDBERG, CLARK and GEE, Circuit Judges.

GOLDBERG, Circuit Judge:

[1] Bancroft Manufacturing Company, Inc. [the Company] produces various aluminum products at three plants in and around McComb, Mississippi. On July 1, 1971, the National Labor Relations Board conducted a union representation election at the three facilities; 361 Company employees voted to be represented by the Southern Council of Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO [the Union], and 286 employees voted against the Union.[1] Although the NLRB certified the Union as the employees' bargaining representative, the Company made timely objection to alleged Union conduct affecting the election results and has consistently refused to bargain with the Union. After

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1. Three ballots were void and thirty-two were challenged; the latter were not counted because they were too few to affect the election results. Since there were 674 employees eligible to vote, and since the total of pro-union, anti-union, void and challenged ballots comes to 679, it seems that almost every eligible voter and a few ineligible voters voted.

nearly three years of procedural skirmishing, including an evidentiary hearing before an administrative law judge, the NLRB found that the Company's refusal to bargain was unjustified and constituted a violation of sections 8(a)(5) and (1) of the National Labor Relations Act.[2] 1973, 210 NLRB No. 90. Now, almost four years after the election, the Board asks us to enforce a bargaining order against the Company. We have carefully examined the record and have decided that substantial evidence supports the Board's determination that the election results correctly reflected the free and reasoned choice of a majority of the employees of the bargaining unit. This is a close case, but in the absence of absolute certainty, we turn to the certitude of the administrative law judge and the Board, whose findings enable us to conclude that enforcement shades denial; the Board's order will be enforced.

[2-4] Before we begin our discussion of the particulars of this case, we must remind ourselves that the burden of proof of unfairness in representation elections is on the complaining party, N.L.R.B. v. Mattison Machine Works, 1961, 365 U.S. 123, 81 S.Ct. 434, 5 L.Ed.2d 455; N.L.R.B. v. Con-Pac, Inc., 5 Cir. 1975, 509 F.2d 270; N.L.R.B. v. White Knight Mfg. Co., 5 Cir. 1973, 474 F.2d 1064; Bush Hog, Inc. v. N.L.R.B., 5 Cir. 1969, 420 F.2d 1266,

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2. Board orders concerning representation matters are reviewable only as they are drawn into question by a petition for enforcement or review of a Board order made under section 10(c) of the Act to restrain an unfair labor practice. 29 U.S.C. § 159(e) and (f); *see* Bishop v. N.L.R.B., 5 Cir. 1974, 502 F.2d 1024.

29 U.S.C. § 158 provides, in pertinent part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(5) to refuse to bargain collectively with the representatives of his employees.

and that the Board's long and varied experience in representation matters requires us to give special respect to its decisions as to whether given conduct reasonably tended to interfere with the employees' free choice.[3] N.L.R.B. v. Leatherwood Drilling Co., 5 Cir. 1975, 513 F.2d 270; N.L.R.B. v. Muscogee Lumber Co., Inc., 5 Cir. 1973, 473 F.2d 1364; N.L.R.B. v. Golden Age Beverage Co., 5 Cir. 1969, 415 F.2d 26. As long as the NLRB's decision is reasonable and based upon substantial evidence, we must enforce its order, even though we might have taken a different view had the case come before us as an original matter. 29 U.S.C. § 160(f); Universal Camera Corp. v. N.L.R.B., 1951, 340 U.S. 474, 491, 71 S.Ct. 456, 466, 95 L.Ed. 456, 469; T.I.M.E.-DC, Inc. v. N.L.R.B., 5 Cir. 1974, 504 F.2d 294, 299-300. With these decisional guidelines in mind, we turn to the substance of the Company's complaints.

I

Forty-three percent of the Company's workforce at the time of the election were black people, so that much of the Union's organizing effort was devoted to convincing the blacks that their interests would best be served by choosing the Union to represent them. The Company contends that the Union's actions in this regard amounted to an inflammatory appeal to racial passion which caused the very large number of black employees to vote for the Union on the basis of racial considerations alone. The major support for this theory is provided by the Board's finding that Union organizer Sylvester Hicks, a black man, warned black employees on several occasions that "if the blacks did not stay together as a group and the Union

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3. For a thorough and thoughtful discussion of the problem of campaign tactics and employee free choice, *see* Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv.L.Rev. 38 (1964).

lost the election, all the blacks would be fired." Furthermore, in response to employee questions about layoffs, Hicks warned that "seemingly the trend was . . . that the blacks were going to be laid off if they didn't stick together and try to get the plant organized to where they would have some protection. . . ." Finally, a rumor had it that the Company would give an automobile to a friendly black employee, J. C. Butler, if Butler helped to swing the black vote. At a meeting attended by a large number of white and black employees, Rev. Harry Buie, a black minister employed by the Delta Ministry (an anti-poverty organization) and invited by the Union to assist in the campaign, commented on this rumor by lamenting that "it had been called to his attention that an employee was to be given a car to swing the black vote. He understood that he was a soul brother and the part that hurt him so bad was that it would be a sold out soul brother."

The Company complains that the remarks of Hicks and Buie were grossly inaccurate and were calculated to instill in the black employees the conviction that their employer held blacks in low esteem and intended to discriminate against them in an invidious manner. The racially-oriented propaganda, the Company contends, was so likely to impair the blacks' capacity for a reasoned decision that the election must be set aside. The administrative law judge found, however—and the Board agreed—that these remarks were unimportant and not unreasonable in the particular situation, and that even if the statements were untrue, they had not exercised a significant influence on the results of the voting.

The NLRB first enunciated a policy for dealing with racially inflammatory remarks in representation campaigns in Sewell Mfg. Co., 1962, 138 NLRB 66. In *Sewell*, a Mississippi employer conducted a strident anti-union cam-

paign on the theme that since the union seeking to represent its employees supported the struggle for equal civil rights for black citizens, a vote for the union was tantamount to a vote for an integrated society, a goal the employer assumed its all-white workforce rejected. When the union lost the election, it sought to have the balloting invalidated on the ground that the employer had conducted a campaign of race hate which succeeded only too well in diverting the employees' attention from the real issues at stake in the election. The NLRB Regional Director declined the union's request, on the ground that none of the statements made by the employer were alleged to be untrue, and that the charges were mere propaganda which the employees could weigh for themselves. The Board disagreed with the Regional Director and voided the election, finding that the employer had deliberately sought to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals which have no place in an election campaign. The NLRB reasoned:

> We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty.
>
> What we have said indicates our belief that appeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.

This is not to say that a relevant campaign statement is to be condemned because it may have racial overtones. . . .

We would be less than realistic if we did not recognize that such statements, even when moderate and truthful, do in fact cater to racial prejudice. Yet we believe that they must be tolerated because they are true and because they pertain to a subject concerning which employees are entitled to have knowledge—the union's position on racial matters.

So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

138 NLRB at 71-72. *See also* Universal Mfg. Corp., 1966, 156 NLRB 1459.

On the same day that *Sewell* was decided, the Board concluded that employer literature not dissimilar to that used in *Sewell* fell within permissible bounds because the statements were made in a generally temperate fashion. Allen-Morrison Sign Co., Inc., 1962, 138 NLRB 73. In this spirit, the Board has consistently approved union campaigns which stress black racial pride, the past history of discrimination against blacks in American society or the present disadvantaged status of blacks as a class, where the statements do not claim special privileges for blacks,

on the theory that such statements are true and that economic issues, even racially-oriented ones, properly form the core content of representation contests. Baltimore Luggage Co., 1967, 162 NLRB 1230, enforced 4 Cir. 1967, 387 F.2d 744; Aristrocrat Linen Supply Co., Inc., 1965, 150 NLRB 1448; Archer Laundry Co., 1965, 150 NLRB 1427. On the other hand, the Fourth Circuit has found statements comparing the union struggle in a particular plant with recent, nearby incidents of racial violence to be sufficiently inflammatory to fall within the prohibition of *Sewell*. N.L.R.B. v. Schapiro & Whitehouse, Inc., 4 Cir. 1966, 356 F.2d 675.

[5] The racially-oriented remarks here do not fall within the ambit of any previous application of the *Sewell* doctrine,[4] thus, we begin our discussion of this particular

4. We have found only three reported cases in which black employees have been told that they will be fired or laid off if the union loses the election. In Kresge-Newark, Inc., 1955, 112 NLRB 869, a union organizer allegedly made such a statement, and although the Regional Director found no evidence to support the employer's allegation, the Board ruled that the statement would not have been objectionable even if it had been made, as the union was certainly in no position to effect such discharges, and that the statement "constituted at most an accusation against the Employer in the nature of campaign propaganda which the employees were capable of evaluating. . ." 112 NLRB at 871. The continuing vitality of *Kresge-Newark* would seem to be in serious question since *Sewell*, for the statements in question were certainly untrue and, because of their racial nature, may have worked acute prejudice upon the employees' reasoned consideration of the employer's position in the election. In Hobco Mfg. Co., 1967, 164 NLRB 862, there was a rumor that if the union were to lose the election, all the black employees would be replaced by whites, but no evidence was presented linking the rumors to union agents; in fact, the union organizers attempted to refute the rumor. The Board found that the employer's failure to establish a sufficient nexus between the rumor and the union was fatal to the employer's *Sewell*-based objections. Finally, in N.L.R.B. v. Staub Cleaners, Inc., 2 Cir., 1969, 418 F.2d 1086, cert. denied, 1970, 397 U.S. 1038, 90 S.Ct. 1357, 25 L.Ed.2d 649, there were rumors similar to those in *Hobco*, but the Board found—and the Second Circuit agreed—that a combination of union disavowals and employer rebuttals had effectively neutralized the rumors.

problem by noting that *Sewell* requires the party making a racially-oriented statement to demonstrate the truth of the statement, and we believe that the Union has failed to discharge that burden here. Union Organizer Hicks based his comments on the possibility of discriminatory discharges or layoffs of blacks on the fact that several recent layoffs had affected many more blacks than whites, and on his belief that the percentage of blacks in the workforce had recently declined from 38% to 34%. In fact, the layoffs were apparently made on the basis of seniority and the proportion of black employees remained near 43% at all times relevant to our inquiry. In other words, there is no evidence that the Company intended to or did in fact treat its black employees unfairly. With respect to Buie's comment about the "sold out soul brother," the most that can be said for it is that the accusation was based on second- or third-hand hearsay, that Buie did not attempt to verify the accuracy of the rumor before making his accusations, and that employee Butler eventually *purchased* an automobile from the Company, apparently at near-market value, as he had done once several years before this representation campagin.

The Board decided that Hicks' statements about mass black firings were not really false but were instead reasonable predictions of future events based on the Company's recent history of layoffs. The problem with this reasoning is that however plausible or commonplace the statements may have been, the fact remains that Hicks and Buie were wrong, and that their comments could have led black employees to infer that the Company would discriminate against them although there was no evidence to support such a conclusion. This is not a case, as Baltimore Luggage Co., *supra*, and Archer Laundry Co., *supra*, were, in which union organizers tell black employees that

(white) employees in general have tended to discriminate against blacks; this is a case where the employees were told that *their* employer discriminated against *them* in a particular fashion.

[6] Where racial remarks are injected into an election contest, but do not form the core or theme of the campaign as they did in *Sewell*, the court's analysis of their effect should follow a two-step process. First, were the statements racially inflammatory? If they were, then the test for truth and relevancy must be made as *Sewell* describes. Second, if the remarks were not racially inflammatory, then the statements should be reviewed under the familiar standards applied to any other type of alleged material misrepresentation.

[7] Turning to the case at bar, we find substantial evidence to support the determination of the administrative law judge and the Board that the disputed statements did not so taint the campaign with racial passion as to make a fair election impossible. Hicks and Buie voiced pro-Union and pro-black protection sentiments, but they certainly did not project a black versus white dichotomy. This campaign was waged in a bargaining unit which was 57% white and 43% black. As a matter of common sense, any attempt by the Union to set black against white would have been suicidal, for the Union could successfully organize these plants only by forging a harmonious racial amalgam. It is certainly possible that a union might fail to see its own best interests, but there is no evidence here that the Union told blacks that they ought to dominate the Union or enjoy benefits unavailable to their fellow workers. There is no evidence that the Union sought to incite blacks against whites; at no time were there either acts or threats of violence, and there is certainly nothing to indicate that the black employees were less favorably

disposed toward the Company than were their white co-workers, either before or after the remarks in question. In this case there was no racially-oriented campaign; the vast bulk of the literature on both sides was devoted to the economic issues ordinarily found in representation contest: whether the Union or the Company would ensure the highest wages, the best pension plans, the firmest job security. The NLRB found Buie's remarks to be nothing more than the sort of inter-employee squabbling that so often occurs in campaigns.

The next step is to review the record to determine if racial inflammation resulted from the interjection of these remarks. Both the administrative law judge and the Board concluded that none of the disputed statements could be characterized as racially inflammatory. We agree. The statements of Hicks and Buie were neither variations on a Union theme nor attempts to incite racial passions. Rather, they were more in the nature of asides addressed to a particular group of employees in the context of a campaign aimed at securing the adherence of all employees to the Union. Although we cannot condone the Union's somewhat cavalier attitude toward truth in the sensitive area of race relations, this record does not disclose that the disputed statements had an inflammatory effect on the black employees.

[8] This then leads us to the second step of the process required here. The Union made material misrepresentations of fact during the campaign, hence we must decide whether the election must be set aside on that account. In Hollywood Ceramics, 1962, 140 NLRB 221, the NLRB adopted a four-pronged test for evaluating questionable campaign communications which we have applied in numerous cases, *see, e. g.*, United Steelworkers of America, AFL-CIO v. N.L.R.B., 5 Cir. 1974, 496 F.2d 1342,

1345; N.L.R.B. v. Muscogee Lumber Co., *supra*, 473 F.2d at 1368: (1) whether there has been a misrepresentation of a material fact; (2) whether the misrepresentation came from a party who was in a position to know the truth or who had special knowledge of the facts; (3) whether the other party had adequate opportunity to reply and to correct the misrepresentation; and (4) whether the employees had independent knowledge of the misrepresented facts, so that they could effectively evaluate the propaganda. This standard has generally been utilized by balancing the last three factors, once the threshold question of whether there has been a material misrepresentation has been answered in the affirmative.

[9] We have already determined that the statements of Hicks and Buie were material misrepresentations, thus satisfying the first requirement and we will assume *arguendo* that the employees had no independent knowledge either of the discharge-layoff situation or of the circumstances surrounding employee Butler's purchase of an automobile from the Company, so that the fourth criterion is also weighted against the Union. On the other hand, neither the Union in general nor Hicks in particular were in a position to know the Company's future plans regarding layoffs or discharges. Even if the racial import of Hicks' charges lent to his statements a persuasive force which they would not otherwise have had, Hicks admitted at the time that he was basing his allegations in part upon an extrapolation of past trends, so that we cannot say that the Board was unreasonable in its determination that the employees most likely regarded the statements only as slightly credible Union propaganda and valued them accordingly. With respect to Buie's remarks, Hicks immediately asked several employees to check the accuracy of the rumors, thus considerably diminishing the impact of Buie's comments, and nothing more was said by any Union

agent regarding employee Butler and his automobile-to-be. In sum, the third factor in our calculus weighs against the Union, but not decisively.

Of controlling importance to our decision, however, is the fact that although the Company never replied directly either to Hicks or to Buie, the Company was well aware that the Union was appealing to the racial pride of its black employees, and the Company attempted to rebut those appeals in its own communications. Company literature stressed over and over again that an employee's job depended solely on his or her own efficiency and the Company's ability to compete in the industry. Company fliers were replete with magazine and newspaper articles chronicling union discrimination against blacks in all parts of the nation. The Company's president personally made a strong plea for employee loyalty, condemning racial bigotry, reminding the employees of the Company's fair labor policies, and expressing both his displeasure at the Union's mention of racial issues ("I don't know of anything that a man can do that is dirtier than this.") and his satisfaction that "our black employees are not being fooled by this talk." These vigorous Company rejoinders offered the employees an opportunity to view the Hicks and Buie remarks in the context of avowal and denial in which representation elections are customarily conducted. These rebuttals and the Union's adequate margin of victory (56% of the vote) convince us that the Board did not abuse its broad discretion in representation matters by finding that the Company had failed to show that the Union's statements so lowered the tone of the campaign that the free choice of a majority of the employees cannot be determined from the election results. *See* N.L.R.B. v. Golden Age Beverage Co., *supra*, 415 F.2d at 31; N.L.R.B. v. Houston Chronicle Publishing

Co, 5 Cir. 1962, 300 F.2d 273, 278; N.L.R.B. v. Staub Cleaners, Inc., *supra*, 418 F.2d at 1089.[5]

II

[10] The Company makes several other objections to Union and Board conduct; we will discuss each in turn. First, the Company complains that the Union offered to waive initiation fees for all employees who would sign authorization cards before the election, in violation of the rule in N.L.R.B. v. Savair Mfg. Co., 1973, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495, where the Supreme Court decided that such an action was impermissibly coercive. The problem with the Company's argument is that the record shows that the Union made an unqualified promise to waive initiation fees for all employees, including those who declined to join the Union until after the election. This even-handed Union conduct is certainly not the sort of pressure tactic that *Savair* meant to discourage, *see* N.L.R.B. v. Benner Glass Co., 5 Cir. 1975, 514 F.2d 641; N.L.R.B. v. Con-Pac, Inc., *supra*, and the Board correctly concluded that the Company could not prevail on this theory.

[11] Second, the Company charges that the Union threatened pro-Company employees with physical violence and the loss of their jobs in the event of Union victory. Eight employees testified that they personally were threatened or that they heard rumors of possible retribution against pro-Company employees. Only one witness, however, testified to a direct threat by a Union agent (Hicks)

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5. The Company also charges that the Union made various other material misrepresentations of fact regarding Company charitable contributions and state and federal government support of labor unions. We agree with the Board that each of these various statements was either true or innocuous or both, and that the asserted abuses offer no basis for setting aside the election.

in connection with the election, and the administrative law judge credited Hicks' denial thereof. We are bound by the hearing officer's credibility resolution, Armstrong Rubber Co. v. N.L.R.B., 5 Cir. 1975, 511 F.2d 741; T.I.M.E.-DC, Inc. v. N.L.RB, *supra*, and even if all the other testimony presented by the Company is taken as true, that evidence was only of random rumors and threats not attributable to the Union and thus not entitled to the same weight as evidence of Union-directed threats would be. *See* United Steelworkers of America, AFL-CIO v. N.L.R.B., *supra*; N.L.R.B. v. White Knight Mfg. Co., *supra*. In these circumstances, we believe that the Board justifiably concluded that the alleged misconduct was neither so aggravated nor so pervasive as to require the invalidation of the election.

[12] Third, the Company argues that the conduct of the Board official in charge of the balloting was improper, in that the agent refused to allow certain employees to vote and discouraged many other employees from attempting to vote by his rude and belligerent behavior. Much of the Company's evidence on this matter comes from the testimony of ten employees who were ineligible to vote because they had not been both employed *and* working on the eligibility cut-off date. The Board agent properly told these people that they were not permitted to vote; when they persisted, the official allowed them to cast challenged ballots. The administrative law judge found that only four or five employees were prevented from voting, and he concluded that the outcome of the election could not have been affected thereby. There is nothing here to mandate a new election.

III

Finally, the Company contends that the NLRB failed to provide it with a full, fair and proper hearing in two respects: 1) the Board adjudicated this matter in an unfair labor practice hearing instead of in a representation proceeding; and 2) the Board refused to allow the Company to discover or to submit evidence that the Union discriminates against blacks and thus is unfit to represent the black employees in the bargaining unit. A consideration of the first objection will require a brief recitation of the protracted procedural history of this case.

[13] After the ballots had been counted and the Company had filed its objections to Union conduct, the NLRB Regional Director made an *ex parte* investigation pursuant to 29 C.F.R. § 102.69, determined that none of the Company's allegations were meritorious and certified the Union on October 20, 1971. As we have seen, the Company refused to bargain with the Union, so the Regional Director filed an unfair labor practice complaint against the Company on March 10, 1972; the Board entered summary judgment against the Company on June 2, 1972, and ordered the Company to bargain. 197 NLRB No. 39. The Company and the Board then filed petitions in this Court for review and enforcement, respectively, of the bargaining order. While these petitions were pending, the NLRB's General Counsel concluded that some of the Company's objections raised substantial and material issues of fact which should be resolved by a hearing, and the Board granted a joint motion to vacate its order on January 3, 1972, remanding the case to the Regional Director for "further appropriate action."[6] The Regional Director then

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6. The Board has discretion to modify or set aside an order at any time before filing the record of the case in the Court of Appeals for enforcement, so long as the interested parties are given "reasonable notice". 29 C.F.R. § 102.49; *see* N.L.R.B. v. Con-Pac, Inc., *supra*, 509 F.2d at 273.

instituted an unfair labor practice [ULP] hearing before an administrative law judge, who found no merit in the Company's defenses and ruled on June 7, 1973, that it had wrongfully refused to bargain in violation of section 8(a)(5) of the Act. The Board affirmed the administrative law judge's decision and once again ordered the Company to bargain with the Union.

[14] The Company argues that the Regional Director's decision to hold a hearing in the form of a ULP proceeding instead of a representation proceeding violated its right to constitutional due process. The Company insists that although the ULP hearing afforded it the opportunity to present evidence and cross-examine opposing witnesses, provided it the protection of the rules of evidence used in the federal district courts, and placed the burden of proof on the General Counsel, yet a representation hearing—which offers none of these advantages—would somehow have been more "fair" because the NLRB's General Counsel would have been a neutral party instead of an adversary one. We are at a loss to understand the logic of this position, for it seems clear that the ULP hearing boasts all of those procedural safeguards ordinarily associated with the concept of due process. Although this Court has often ruled that due process requires that a party charged with an unfair labor practice be given a hearing at some point where "substantial and material issues of fact" are raised, *see* N.L.R.B. v. Golden Age Beverage Co., *supra*; Tyler Pipe & Foundry Co. v. N.L.R.B., 5 Cir. 1969, 406 F.2d 1272; United States Rubber v. N.L.R.B., 5 Cir. 1967, 373 F.2d 602; *see also* 29 C.F.R. § 102.69(f), we have never prescribed any particular form for such a hearing, and we conclude that the ULP hearing here afforded the Company due process. *See* N.L.R.B. v. Commercial Letter, Inc., 8 Cir. 1974, 496 F.2d 35, 38.

The Company's second procedural objection stems from its contention, based on N.L.R.B. v. Mansion House Center Management Corp., 8 Cir. 1973, 473 F.2d 471, that the Union's certification must be revoked because its alleged practice of racial discrimination has rendered it unfit to represent the Company's black employees. When the Company issued a subpoena *duces tecum* for statistical data concerning the Union's racial composition and related matters, and moved to amend its answer to the ULP complaint to include the *Mansion House* defense, the administrative law judge revoked the subpoena and denied leave to amend. The Company appealed these rulings to the Board, which concluded that no prima facie case of discrimination had been made out and so denied the appeal. The Company now urges that the actions of the administrative law judge and the Board deprived it of the opportunity to present a complete defense to the ULP charges against it.

[15] In *Mansion House*, the Eighth Circuit refused to enforce a Board order requiring an employer to bargain with a union local which had discriminatory membership policies, on the ground that the NLRB, as an agency of the federal government, cannot be allowed to be "a willing participant in the union's discriminatory practices." 473 F.2d at 473. The Board subsequently adopted the *Mansion House* rule in Bekins Moving & Storage Co., 1974, 211 NLRB No. 7, holding that since the Fifth Amendment "forbids the participation in, and the actual practice of, invidious discrimination by the Federal Government," the NLRB has no constitutional power to confer representation certificates upon unions which practice racial discrimination. Both *Mansion House* and *Bekins* dealt with union discrimination at the local level only, and it is clear that it is the local unit with which the rule of those

cases is ordinarily concerned, for it is the local—and not the regional or international union organization—which usually bargains with employers and is charged with fair representation of all its members in its dealings with management. *See* Grant's Furniture Plaza, Inc., 1974, 213 NLRB No. 80; Williams Enterprises, Inc., 1974, 212 NLRB No. 132. Neither case stands for the propositions that discriminatory membership practices in a single local necessarily infects an entire international or that discriminatory practices by an international must taint each of its locals.

[16] In this case, the Company is hardly in a position to contend that the local union organization in its plants discriminates against blacks, considering its allegations that the Union paid all too much attention to organizing black employees during the campaign. Instead, the Company argues that since the Union here is a branch of the Southern Council of Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and since the Carpenters are allegedly notorious for their discriminatory membership policies, this local's certification must be revoked. Armed with this rationale, a 1972 federal court decision, United States v. United Brotherhood of Carpenters & Joiners of America, Local 169, 7 Cir. 1972, 457 F.2d 210, adjudging two Illinois construction locals guilty of racially discriminatory membership practices, and a magazine article accusing some Carpenters' construction locals of similar offenses, the Company issued a subpoena *duces tecum* for:

> Records of the Carpenter's Union that indicate the numbers of blacks that hold office and are employed as Representatives, Officers or Officials on a full time basis by the Carpenter's Union, as compared to the number of whites performing the same duties. Also, total membership of the Carpenter's Union with a breakdown on white and black number percentages by State.

A cursory glance at the subpoena indicates that the vast and vague parameters of the Company's allegations were exceeded only by the projected scope of discovery. Furthermore, the information advanced by the Company in support of its request was insufficient and largely irrelevant. We have seen that *Mansion House* and *Bekins* were concerned primarily with discriminatory membership and representation policies at the local level, hence, it would be logical to assume that the Company would have come forward with at least some evidence or allegation that this particular local engages in such practices. The Company did not do so; rather, it sought to tie the membership practices of an industrial local in Mississippi to those of construction locals in Illinois. Moreover, although the Company asked for the records of the Union's international and regional organizations, it failed to establish or even to allege any nexus between policies at the international and regional levels and policies at the local level. In these circumstances, we conclude that the Company failed to raise a prima facie defense under *Mansion House* and *Bekins*, and we hold that the Board did not abuse its discretion in refusing to enforce the subpoena or to allow the amendment of the Company's answer.

IV

[17] In summary, four years after a considerable majority of the employees in the Company's plants voted that the Union should represent them for collective bargaining purposes, we enforce an NLRB bargaining order against the Company. Although it is clear that the Union made occasional crude and unjustifiable remarks during

the course of the campaign, and although the Board's subsequent disposition of the Company's objections to those remarks was neither as speedy nor as efficient as it might have been, we are convinced that both the election and the investigation thereof were fair to all concerned.

Enforced.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15—CA—4368

BANCROFT MANUFACTURING COMPANY, INC.; CROFT ALUMINUM COMPANY, INC.; CROFT LADDERS, INC.; CROFT METAL PRODUCTS, INC.; LEMCO METAL PRODUCTS, INC.

and

SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO

DECISION AND ORDER

On June 7, 1973, Administrative Law Judge Eugene E. Dixon issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. In addition, Respondent filed a motion for reconsideration regarding the revocation of its *subpoena duces tecum*.[1] The General Counsel filed a motion to consolidate the instant proceeding with Case 15-CA-4267, involving the same parties now pending before the Board, and Respondent filed a response in opposition to such motion to consolidate.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National La-

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1. Respondent's motion for reconsideration regarding the revocation of its Subpoena Duces Tecum No. B-97792 is hereby denied, as it raises nothing not previously considered by the Board in its Order dated May 15, 1973.

2. The motion by the General Counsel to consolidate the instant case with Case 15-CA-4267 is hereby denied inasmuch these two proceedings were tried separately and their consolidation at this time would serve no practical purpose.

bor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Unlike our dissenting colleague, we find in agreement with the Administrative Law Judge that the racial statements, discussed below, constituted neither an appeal to racial prejudice, nor an attempt to inflame racial hatred. In our opinion the statements in question were nothing more than the expression of a commonly held viewpoint that blacks, as a class, are particularly vulnerable in the important areas of economic security and job rights and that union representation would serve to protect and promote their best interests. In prior determinations, we have recognized that comments of this nature do not fall into the category of conduct which would warrant setting aside an election.

In *Sewell Manufacturing Company*,[3] the Board determined that statements which deliberately sought to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals have no place in an election campaign. In *Sewell*, the antiunion campaign was based on appeals to prejudice by excessive publicizing of an AFL-CIO donation of money to the Congress of Racial Equality to be used to support freedom-ride projects in Alabama and Mississippi. This publicizing also included the circulation of photographs of a white AFL-CIO official dancing with a black woman. Such material clearly was not germane to the election but sought to overstress and exacerbate

3. 138 NLRB 66.

racial feelings by irrelevant and inflammatory appeals. At the same time, the Board in *Sewell* went on to make clear that it was not suggesting that any mention of race or racial issues should be eliminated from the election campaign process. Thus, although the distinction between the permissible and the impermissible is not easily drawn in the abstract, this Board has explained that the rule laid down in *Sewell* was directed at campaign arguments inflammatory in character which served as nothing more than appeals to animosity, setting race against race and not to noninflammatory appeals designed to encourage solidarity among racial minorities in order to promote their separate social and economic interests.[4] Thus, the Board has refused to set aside elections where the campaign consisted of racial propaganda designed to encourage racial pride and concerted action,[5] and has found that appeals to black solidarity through unionism in facing barriers to equality with whites is a lawful method of concerted action which all employees may, under the protection of the Act, use to better their lot in this society.[6]

Turning to the specific conduct in question here, the record shows Union Organizer Hicks told certain employees that "if blacks did not stay together as a group and the Union lost the election all the blacks would be fired." A rumor to the same effect circulated in the plant. In response to questions about possible future layoffs, Hicks told employees that "Bancroft could lay off anybody he wanted and could hire anybody he wanted. They didn't have any protection on the job." Hicks further told employees "that seemingly the trend was . . . that the

4. *The Baltimore Luggage Company*, 162 NLRB 1230.

5. *The Archer Laundry Company*, 150 NLRB 1427, and *Aristocrat Linen Supply Co., Inc.*, 150 NLRB 1448.

6. *Baltimore Luggage Company, supra* at 1234. See also *Hobco Mfg. Co., an Operating Division of Genesco*, 164 NLRB 862.

blacks were going to be laid off if they didn't stick together and try to get the plant organized to where they would have some protection, it could last forever." The record also shows that there had been three layoffs during or shortly before the campaign in which the employees laid off were mostly black employees.

It cannot be gainsaid that the impact of layoffs is a matter of utmost concern to the economic well-being of employees. It is equally clear that the Union's viewpoint on the impact of future layoffs on black employees is a matter relevant to the campaign, particularly in view of the record evidence that there had been three layoffs during or shortly before the campaign in which the employees laid off were mostly black employees. At no time was there any suggestion that black employees were entitled to any greater rights or benefits than other employees; or could these comments be properly viewed as requesting a vote against the white employees. In this context, it is reasonable to conclude that the statements and discussions about the impact of future layoffs were not "appeals to racial prejudice on matters unrelated to election issues."[7] On the contrary, we consider the Union's viewpoint on the impact of future layoffs on black employees to be germane to the larger issue of the advantages and disadvantages of the Union as a means of promoting economic security and job rights.

Finally, we believe the rule in *Sewell* is applicable only in those circumstances where it is determined that the "appeals or arguments can have no purpose except to inflame the racial feelings of voters in the election."[8] For the reasons described above, we consider the Union's viewpoint on the impact of future layoffs on black employees

7. *Sewell Manufacturing Company, supra* at 71.

8. *Ibid.*

to be germane to the larger issue of the advantages and disadvantages of the Union as a means of promoting equality for black employees in economic security and job rights. Furthermore, we do not consider this viewpoint to have been unreasonably or intemperately presented to the voters, especially in view of the record evidence that there had been three layoffs during or shortly before the campaign in which the employees laid off were mostly black employees. In these circumstances, we are at a loss to understand what evidence could be presented to our dissenting colleague which would establish the truthfulness of the prediction of a future event by a party who has no control over the event. We do not believe *Sewell* imposes a burden on the Union to do so. The three layoffs in the immediate past made it appear likely that the next layoff would likewise affect mostly blacks, and the union statement was therefore reasonably based in fact. At most, the Union's viewpoint amounted to no more than an accusation against the Respondent in the nature of campaign propaganda which the employees were capable of evaluating in choosing their representative.[9]

In addition to the foregoing, one further incident requires discussion. The record shows that a rumor circulated in the plant that a procompany black employee, Butler, would have a car given to him to help swing the black vote. A statement to that effect was also made by a Reverend Buie, another black, in a speech given at a union meeting. Union Organizer Hicks asked several employees to check this rumor for him. We are not persuaded that this incident provides a basis for setting aside the election, particularly since the rumor was not totally unfounded and Butler was apparently dealing with the Respondent for an automobile during the election campaign. Further-

9. *Kresge-Newark, Inc.*, 112 NLRB 869. See also *Hobco Mfg. Co., supra* at 871.

more, it does not seem uncommon or unusual for employees who are supporting a union to impugn the motives of fellow employees who are opposing their efforts. There is no reason for treating such conduct differently because the incident involved employees of a racial minority.

Accordingly, for the aforestated reasons, we adopt the Administrative Law Judge's recommendation that this objection be overruled.

Subsequent to the issuance of the Administrative Law Judge's Decision and the filing of exceptions and briefs thereto, Respondent filed a motion to reopen the record and hearing for the purpose of presenting additional testimony on the matter of the waiver of initiation fees. In support of its motion, Respondent contends that the Administrative Law Judge improperly excluded testimony by certain witnesses on the matter of initiation fees at the hearing and that in view of the recent Supreme Court decision in *Savair Manufacturing Company*,[10] other and additional witnesses should be allowed to testify on this matter.

The record shows, as the Administrative Law Judge found, that a rumor circulated in Respondent's plants that those who voted for the Union would have initiation fees waived while those who did not vote for the Union would have to pay initiation fees or penalties of up to $150 or $200. None of the witnesses who described this rumor identified any agent of the Union as the individual who originated or specifically related this rumor to them. The credited testimony further shows that Union Representative Hicks told employees that there would be no initiation fees, and that there would be no incentive to charge

10. ..... U.S. ....., 94 S.Ct. 495 (December 17, 1973).

an initiation fee or fine people because in a right-to-work State the Union had to represent the people whether they belonged to the Union or not. Hicks further testified that nobody had ever paid an initiation fee in his local during his 17 years in that local. Moreover, Respondent indicated in campaign speeches and through extensive campaign material that no employee would ever have to join the Union to work in its plants, even if the Union won the election.

After carefully reviewing the record evidence related to the waiver of initiation fees, including the offer of proof made by the Respondent at the hearing, we are satisfied that the Administrative Law Judge did not commit prejudicial error when he ruled that further evidence on the waiver of initiation fees would be cumulative and rejected Respondent's offer of proof. Furtherance, inasmuch as Respondent offers no indication as to the substantive content of any newly discovered or previously unavailable evidence it would offer, there are no matters which require the reopening of the record. Accordingly, Respondent's motion is denied.

Moreover, we are satisfied that the recent decision by the Supreme Court in *Savair Manufacturing Company, supra,* does not require a reversal of the Administrative Law Judge's recommendation that the objection be overruled on the merits. *Savair* is directed at the coercive effects of requiring employees to designate the union as their representative *prior* to the election or otherwise lose the economic benefit of reduced or waived initiation fees or dues. It is the potential impact and effect of requiring such affirmative action by employees before the election that the Supreme Court found interfered with employees' free choice in the election. Unlike *Savair,* there is no evidence in the instant case that the Union conditioned the waiver of initiation fees on affirmative action by em-

ployees prior to the Board election. Accordingly, we adopt the Administrative Law Judge's recommendation that this objection be overruled.[11]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Bancroft Manufacturing Company, Inc.; Croft Aluminum Company, Inc.; Croft Ladders, Inc.; Croft Metal Products, Inc.; and Lemco Metal Products, Inc., McComb, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order.

Dated, Washington, D.C., May 29, 1974.

John H. Fanning, Member
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

CHAIRMAN MILLER, dissenting:

I dissent from the findings of my colleagues because I am of the view that the Administrative Law Judge, whose Decision is being affirmed by my colleagues, has departed from official Board precedent in failing to follow the decision of this Board in *Sewell Manufacturing Company*, 138 NLRB 66. In that case, the Board considered carefully the position it would take with respect to racial appeals in election campaigns. Since the case issued over a decade ago, it may be appropriate to set forth an ex-

11. Although dissenting on other aspects, Chairman Miller would join his colleagues in denying the Respondent's exceptions and motion to reopen the record and hearing on the matter of the waiver of initiation fees.

tensive quotation from the Board's rationale in that case appearing at pages 71 and 72:

> We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty.
>
> What we have said indicates our belief that appeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.
>
> This is not to say that a relevant campaign statement is to be condemned because it may have racial overtones. In *Sharnay, supra,* the employer in a letter to employees made a temperate, factually correct statement of the petitioning union's position on integration. In *Allen-Morrison Sign Co., Inc.*, 138 NLRB 73, decided this day, the employer also informed the employees about the petitioning union's position on segregation as well as on union monetary contributions toward eliminating segregation. In the view of Chairman McCulloch, and Members Leedom and Fanning again the statement was temperate in tone, germane, and correct factually.
>
> We would be less than realistic if we did not recognize that such statements, even when moderate and truthful, do in fact cater to racial prejudice. Yet

we believe that they must be tolerated because they are true and because they pertain to a subject concerning which employees are entitled to have knowledge—the union's position on racial matters. As Professor Sovern has pointed out: no one would suggest that Negro employees were not entitled to know that the union which seeks to represent them practices racial discrimination.

So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

As indicated in the last paragraph of the above quotation, the Board set forth a standard in that case which required that any party setting forth another party's position on matters of racial interest would have to do so truthfully and could not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals—and, if this standard was violated, the Board would set aside the election. It will also be noted that the burden was placed on the party making use of any racial message to establish that it was truthful and germane.

In the instant case, as set forth in the Administrative Law Judge's Decision, Union Organizer Hicks told employees that "if the blacks did not stay together as a group

and the Union lost the election all the blacks would be fired." Furthermore, the record shows that there had been three layoffs during or shortly before the campaign in which the employees laid off were, principally, black employees. In a union meeting arranged by the Union shortly after one of these layoffs, the union organizer told the employees "that seemingly the trend was . . . that the blacks were going to be laid off if they didn't stick together and try to get the plant organized to where they would have some protection, it could continue forever."

Other employees testified to the same general effect—i.e., that the union organizer specifically told them that "if they did not vote the union in the Company would lay off all the blacks and keep all the whites."

In addition, at a union meeting, one Reverend Buie stated:

> It had been called to his attention that an employee was to be given a car to swing the black vote. He understood he was a soul brother and the part that hurt him so bad was that it would be a sold out soul brother.

It is abundantly clear that the Union injected the racial issue into the campaign. It is equally clear that the Union did not carry the burden laid down in the *Sewell* case of establishing either that the message with respect to predicted discharges of black employees or the allegation that a black employee was being given an automobile in order to swing the black vote was truthful or supported by any factual evidence whatever.

Under these circumstances, unless we are to abandon the rule of the *Sewell* case, I do not understand how we can fail to set this election aside.

The *Kresge-Newark, Inc.* case relied upon by the Administrative Law Judge is reported in Volume 112 and substantially preceded the issuance of the *Sewell* case in 1962, which was reported in Volume 138. I understand *Sewell*, not *Kresge*, to be the controlling law.

Dated, Washington, D.C. May 29 1974

Edward B. Miller,
Chairman
National Labor Relations Board

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 15-CA-4368

BANCROFT MANUFACTURING COMPANY, INC., CROFT ALUMINUM COMPANY, INC., CROFT LADDERS, INC., CROFT METAL PRODUCTS, INC., LEMCO METAL PRODUCTS, INC.

and

SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO

Peyton Lacy, Jr., Esq., of New Orleans, La., for the General Counsel.

W. J. Smith, of Laurel, Miss., and *A. L. McKinney*, of Atlanta, Ga., for the Union.

Gordon Jackson, Esq., and *W. Kerby Bowling, Esq.* (*Bowling, Brackhahn & Jackson*), of Memphis, Tenn., for the Respondent.

DECISION

Statement of the Case

EUGENE E. DIXON, Administrative Law Judge: This proceeding which originated under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136) herein called the Act, was heard at McComb, Mississippi, March 20, 21, and 22, 1973, pursuant to due notice to

Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., Lemco Metal Products, Inc., herein called the Respondent.

On April 27, 1971, an RC petition (15-RC-4641) was filed with the National Labor Relations Board (herein called the Board) by Southern Council of Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, herein called the Union. On July 1, 1971, an election was held which the Union won. Thereafter, timely objections were filed by Respondent Company which without a hearing were rejected by the Board's Regional Director who issued a supplemental decision certifying the Union as bargaining agent of employees in an appropriate unit. Review was denied by the Board as was a motion to reconsider the denial. Then a bargaining demand was made by the Union and refused by the Company.

Charges were filed February 9, 1972, and a complaint (15-CA-4368) issued March 10, 1972, by the Regional Director on behalf of the General Counsel of the Board (herein called the General Counsel) alleging a violation of Section 8(a)(5) of the Act. In its answer dated March 20, 1972, Respondent admitted the jurisdictional facts of the complaint, the labor organization, the unit and the fact of the election but denied in substance that the election had permitted the employees a free and uncoerced choice and in this connection reiterated its several objections to the conduct of the election as affirmative defense.

There followed a motion by the General Counsel for transfer of the case to the Board and for summary judgment. An order to show cause why summary judgment should not be granted was not answered and on June

2, 1972, the Board issued a decision and bargaining order. On June 19, 1972, Respondent filed a petition for review of the Board's order in the Fifth Circuit Court of Appeals. A cross application for enforcement by the Board was filed with the Court on July 27, 1972. Thereafter, on September 19, 1972, the case was remanded by the Court to the Board for reconsideration on the basis of a Joint Motion to Stay Proceedings by the Board and Respondent.

On November 13, 1972, the General Counsel moved the Board to vacate its decision and order of June 2 and issue an order providing for "a full evidentiary hearing pertaining to the question of interference with the election. . . ." On January 5, 1973, the Board vacated its decision and order and remanded the case to the Regional Director "for further appropriate action." On January 29, 1973, the Regional Director under the title and case number in the caption herein, issued a notice of hearing pertaining to the question of interference with the election "raised by Respondent's answer." On March 8, 1973, Respondent moved that the Board clarify its notice of hearing and to consider the hearing to be in the nature of an RC hearing rather than as a complaint hearing. The motion was denied on March 16, 1973.

As indicated the hearing then took place at McComb, Mississippi, from March 20 to 22. Several procedural issues were raised by Respondent at the hearing. My adverse rulings were presented to the Board by interlocutory appeal. On May 15, 1973, the Board affirmed my rulings in these matters.

Upon the entire record and from my observation of the witnesses I make the following:

Findings of Fact

I. Respondent's Business

Respondent Bancroft Manufacturing Company, Inc., at all times material has been a Mississippi corporation with its principal place of business located at McComb, Mississippi, where it is engaged in producing aluminum windows, screens, and accessories. Respondent Croft Aluminum Company, Inc., at all times material has been a Mississippi corporation with its principal place of business located in McComb, Mississippi, where it is engaged in producing aluminum extrusions and ingots. Respondent Croft Ladders, Inc., at all times material has been a Mississippi corporation with its principal office located in McComb, Mississippi, and place of business in Osyka, Mississippi, where it is engaged in producing aluminum ladders. Respondent Croft Metal Products, Inc., at all times material has been a New York corporation with an office and place of business located in McComb, Mississippi, where it is engaged in producing aluminum windows and doors. Respondent Lemco Metal Products, Inc., at all times material has been a New York corporation with an office located in McComb, Mississippi, and place of business in Osyka, Mississippi, where it is engaged in producing combination screen and storm windows and combination doors and screen doors.

Respondent Companies at all times material have been affiliated businesses with common officers, ownership, directors, offices, and operators and constitute a single integrated business enterprise with said directors and operators formulating and administering a common labor policy for Respondent Companies affecting the employees of Respondent Companies.

During a representative 12 months period Respondent Companies individually and collectively purchased and received goods and materials valued in excess of $50,000 which were shipped directly to Respondent Companies individually and collectively in Mississippi from points located outside Mississippi. During the same period of time, Respondent Companies individually and collectively sold and shipped products valued in excess of $50,000 directly to customers located outside the State of Mississippi. On the basis of the foregoing I find that Respondent at all times material herein has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization

Southern Council of Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

On July 1, 1971 a majority of Respondent's employees in a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act[1] designated the Union as their representative for the purpose of collective bargaining with Respondent in a secret ballot election[2]

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1. The appropriate unit is comprised of all production and maintenance employees employed at Respondent's McComb, Magnolia, Osyka, Mississippi, facilities, including plant clerical employees, interplant drivers, and leadmen and leadwomen; excluding over-the-road truckdrivers, office clerical employees, professional and technical employees, watchmen, and guards and supervisors as defined in the Act.

2. The Union won by a vote of 361 to 286 with 32 challenged ballots.

conducted under supervision of the Regional Director. The Union was certified as the collective-bargaining representative of the employees in said unit on October 20, 1971. On January 31, 1972, the Union demanded bargaining of Respondent. On February 4, 1972, Respondent through its attorneys notified the Union of its "intention . . . to defer negotiations for the specific purpose of testing the validity of the election through judicial channels." At no time since has Respondent bargained with the Union.

Countering this *prima facie* case Respondent put in evidence which it claims shows that the Union in the preelection campaign "acted improperly and in such an objectionable way" as to deny "the employees . . . a free and uncoerced right of franchise." And further to the same end that the Board agents acted improperly in the conduct of the election. With respect to the Union's conduct Respondent claims that the Union made an "appeal to racial passion and the inflammation of racial feelings";[3] that it made "gross misrepresentations, which interfered with the election and destroyed the laboratory conditions concerning it"; that employees "were physically threatened by the Union" and threatened with loss of jobs; and that the Union offered financial inducements to get employees "to join, support and vote for the Union. . . ."

Conduct of Board Agents

James E. Lewis, called by the General Counsel, testified that at exactly 5 p.m. the Board agent announced that the polls were closed and that no one else would be allowed to vote. Two people who were in the voting area were allowed to cast their ballots. About four or

3. At all times material, both before and after the election, the work force in Respondent's plants was approximately 43 percent black.

five people were coming up to the polling place at the time the curtains were closed and were not allowed to vote.

In addition to the foregoing alleged improper conduct Respondent contends that the evidence shows "favoritism toward the Union . . . by Board agents, implying an endorsement by the government of their support for the Union and in abuse of the employees' rights relative to challenged ballots, etc.". In this connection Lillie McMillan Conerly, whose name was on the eligibility list had her vote challenged as being an excluded clerical. According to her testimony she told the Board agent that her name was on the eligibility list and "couldn't see why my vote was being challenged, and he got real disturbed with me." The Board agent had her stand aside and came back to her later and told her that if she voted it would be a challenged ballot. She walked out at this point refusing to vote a challenged ballot but returned later and voted a challenged ballot telling the Board agent she "would do it his way." According to the testimony of James Moak, an observer for the Company, the Board agent became "rather rude" with Mrs. Conerly. Moreover, his rudeness was directed toward Moak, too, telling Moak he would decide who was going to vote and not vote.

Another matter relied on by Respondent involved the group of employees who attempted to vote although their names were not on the eligibility list. Company observer, J. C. Butler, testified that the Board agent "wanted to know how long they had been hired, and they told him the date they were hired, and he told them they could not vote. And some of them left, and came back, and told him they wanted to vote as challenged votes, and he told them they could vote a challenged vote but it wouldn't do any good. He didn't see any sense in their

voting a challenged vote when they weren't eligible to vote in the election." According to Butler, it "seemed" to him that at the time the Board agent "became outraged" and his voice was "loud enough" so that some of the people said "that if they had to go through all that they wouldn't even vote" and left without voting.[4] Butler estimated that "15 or 20 or more left. In his affidavit (which Butler testified was all true) Butler had said that of this group not on the eligibility list six or seven originally left and returned a few minutes later. Of these returnees about three or four voted challenged ballots and the others left again without voting. Butler's affidavit also indicated that "the Board agent was real nice to everyone, everyone who appeared in the voting area to vote. And if for any reason a ballot was challenged the Board agent explained the entire challenge procedure to them. . . ."

Mabel Magee, a witness called by Respondent and apparently one of the above group whose names were not on the eligibility list, testified that when she went to vote she was informed that she was not on the list. She left and when she returned she was told she could vote a challenged vote but that she was not eligible because she had not been working long enough. She said, "I think I should vote." According to Magee the Board agent, notwithstanding that "he wasn't talking too loud," "got real kind of angry" but not enough, apparently, to stop her from voting which she did.

I see nothing in the foregoing conduct that could be said to have impinged on the employee's free and uncoerced choice in the election. The closing of the polls in the face of four or five employees certainly had no effect

4. Another of Respondent's witnesses who was also a company observer, Howard Alexander, described the Board agent only as being "a little upset at that time."

on the other employees whatsoever. And the loss of their ballots (even if added to the few who may have not voted in connection with the matter of those whose names were not on the list above) certainly would not affect the outcome of the election. As for the alleged rudeness toward Conerly, it seems clear that both Conerly and the company observer were insisting on her right to vote an unchallenged ballot in the face of a challenge. In this light it is understandable that the Board agent could become somewhat provoked and make an entirely justifiable comment that he was the judge of who would vote and who would not vote. The same observation applies to the Magee incident to some extent with the added observation that apparently Magee magnified the Board agent's displeasure into "kind of angry."

Financial Inducements

There is no question that there were many rumors circulating in Respondent's plants among them one that those that voted for the Union would have initiation fees waived while those that did not vote for the Union would have to pay initiation fees or penalties of up to $150 or $200. There is no question that initiation fees were waived by the Union. Union representative Hicks testified credibly that he told the employees "There is going to be no initiation fees. That after the Union was organized, in 90 days would be no initiation fees. Thereafter, dispensation was available from (then) on."[5] Hicks went on to testify that he had been in the Union 17 years and that nobody in his local had ever paid an initiation fee during that time.

5. This dispensation apparently referred to a provision in the Union's constitution that provided for a $15 initiation fee unless dispensed with by the international president.

According to Hicks' further credited testimony, when questioned about initiation fees, fines and assessments that the Union would charge if voted into the plant Hicks told the employees there would be no incentive to charge an initiation fee or fine people because in a right to work state the Union had to represent the people whether they belonged to the Union or not.

Logic would dictate that a union would be more prejudiced than an employer by the insertion of such propaganda in a campaign. In any event there is no evidence that any agent of the Union represented to any employees that they would have to pay an increased initiation fee if they did not join the Union prior to the election. Moreover, the Respondent put out extensive campaign material concerning the Union's policy regarding dues and initiation fees and further such rumors were effectively rebutted by Respondent's campaign speeches and material clearly indicating that no employee would ever have to join the Union to work in its plants even if the Union won the election.

D. W. McCullough, an employee, testified that a stranger came up to him in a grocery store in McComb and engaged him in a conversation about the Union asking if he would be interested in making some money out of the thing. McCullough did not think so. The stranger said if he "could get about 10 to come to the meeting and 5 to join . . . it might be worth say $1,000 . . . or more" to McCullough. McCullough said he was not interested and left it at that. The next day, according to McCullough, he told his supervisor Madison Brumfield about the offer. He further testified that he told no one else about the matter.

There is no showing that the Union had anything to do with the offer to McCullough. As for the waiver of initiation fees the Board has stated:

> There is no valid basis for concluding that an employee who votes for the union in a secret ballot election must be doing so in any substantial measure because of the previously extended or promised waiver of initiation fees. *DIT-MCO, Inc.*, 163 NLRB 1019, 1022 (1967).

Threats

Respondent contends that threats, economic and physical, "totally destroyed" the laboratory conditions of the election.

Physical Threats

William E. Smith, a black employee in the unit, testified on direct that he went to a union meeting where union representative Sylvester Hicks, also black, told him that if he did not vote for the Union and it came in, his house would be blown up and his car would be burned and all blacks would be out of a job. Hicks also told him according to Smith, that in a strike those who try to cross the picket line "would be took out." On cross-examination Smith testified at first that he was told that if the Union did not come in his house would be bombed and his car destroyed. Then he corrected this warning as being coupled with his failure to vote for the Union, In his affidavit Smith stated that he was told by Hicks (whom he constantly referred to as Rowe) that if the Union was voted in and went on strike employees who crossed the picket line could have their houses bombed and their cars burned. He further stated that the union representative asked him to vote for the Union and did not say anything would happen to him if he voted against the Union. Smith's statement further indicated that Hicks at no time had ever threatened him in any way.

Smith further testified that he talked to no other employee than one Joe Howell about the Union and there is no indication that he related to Howell what he claims was told him by Hicks. Hicks admitted talking to Smith about the Union but denied telling or implying to any employee that if he did not vote for the Union his house and car would be destroyed. Smith also testified that fellow employee Howell told him that if J. C. Butler, a black employee who was campaigning for the Company, did not vote for the Union he would get a whipping. Smith did not reply to this but "just laughed at him."

J. C. Butler testified on direct that he received several anonymous phone calls threatening to "get" him, "blow (him) up" or otherwise "hurt" him if he did not stop campaigning for the Company. Butler also testified that his cousin, Eddie J. Williams, a minister, said at a union meeting that if Butler was against the Union he "should be caught and beat up."

Another employee, Enoch Williams, testified about a visit at his home by Union Representatives Hicks and Peavy[6] as follows:

> Q. What if anything was said to you about violence?
>
> A. Violence? What are you speaking about, violence?
>
> Q. Threats or anything else?
>
> A. Well now, I had threats and I lost a gang of friends by going with the Company, but I just took that for my part, because I'm working for myself, and they wasn't working for me.

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6. Peavy, also black, was a local man hired by Hicks at a weekly salary to chauffeur him and otherwise aid him in his campaign efforts. As such I find that Peavy was an agent of the Union.

> Q. The question was, what if anything was said by Mr. Hicks and Mr. Peavy to you about threats?
>
> A. Well now, Mr. Hicks and Mr. Peavy they didn't give no threats.
>
> Q. Was anything mentioned about a picket line?
>
> A. Yeah, they said all them that went for the Company, and the Company strike, and when they strike somebody be walking the picket lines, and such fellows that went for the Company daresn't come up there, they said we would get it, they didn't say what, but I had an idea what it would be.

Eva Mae Jackson testified about hearing "a rumor" a "few times" that "the Union was going to bomb people's houses, and all kinds of stuff like that." Knox Cothern testified how a fellow employee, J. C. Barrow, told how he had belonged to a union in a steel mill where the people would go out on strike and "blow porches off and blow houses off, and stuff like that."

Levi Deer testified about a conversation with Peavy in which Peavy threatened, "I'll whip you ass" because Peavy thought Deer had caused his discharge by Respondent. During the same argument that lasted about 30 minutes Peavy also tried to get Deer to sign a union card. Johnnie M. Smith testified how a woman came up to her in the plant and told her that if she did not join the Union when they walked the picket line they would whip her.

Assuming that the foregoing evidence offered by Respondent is all true, I do not see how it can be said that it is of enough significance or pervasiveness in a unit of about 700 people to have had any effect on their free and uncoerced choice in the election. But I have serious doubts about the truth of it all. Willie Smith's

testimony and his sworn statement revealed such uncertainties and discrepancies that make it suspect on its face. Considering the fact that this is the only physical threat attributed to Hicks in the entire campaign I am inclined to credit his denial of threatening anyone as described by Smith. As for Peavy's threatening to beat up Levi Deer, there is no showing that the threat was connected with anything but Peavy's assumption that Peavy had caused Deer's discharge.

Economic and Other Threats

Lillie McMillan Conerly testified that Union Organizer Betty Neusbaum visited her at her home where for about 2 hours they engaged in a pleasant conversation about unions. Mrs. Conerly made it clear that she was not interested in the Union. When leaving Neusbaum told Conerly that if the Union won the election and "were dissatisfied with (Conerly's) work, and found out that (she) had voted against the Union (she) could be fired." On cross-examination Conerly denied ever talking to her boss Donald Rayburn about the Union. Then she admitted she "might have" mentioned to him her conversation with Neusbaum and finally was definite that she did so the next day. After equivocating as to what Rayburn told her she admitted in effect that he put her mind at rest about what Neusbaum had told her.

Enoch Williams also testified that in the conversation with Union Organizers Hicks and Peavy at his home they told him that if the Union came in such fellows as he would "have no job."

Edward Andrews testified about hearing rumors in the plant "that if everybody didn't vote for the Union, and if the Union got in, they would be laid off."

Levi Deer also testified that Hicks on another occasion told him that he was "trying to help the colored people" and that if they didn't get the Union "they are going to lay off the blacks and keep all the white." Later Deer asked his white foreman if such a thing was true and was assured that it was not true.

In his testimony Hicks denied making such threats. I deem it unnecessary to determine whether he did or did not make them since the Board has held that statements of this kind do not warrant setting aside an election reasoning that even if called "threats" they were not statements that the employees could not evaluate as campaign propaganda nor were they within the Union's power to carry out. *Rio de Oro Uranium Mines, Inc.*, 120 NLRB 91, 94 (1958).

Johnny R. Morgan and James McCue, both leadmen, attempted to attend a union meeting at the Magnolia courthouse and were turned away because, they were told, they were supervisors. At the time they were also told that if they did attend the meeting charges would be filed against them "immediately." They left. There is some question as to whether this was before or after the election. Before or after it is of no significance as a threat or otherwise in this matter.

Racism

J. C. Butler testified that union organizer Hicks told him that if the blacks did not stay together as a group and the Union lost the election all the blacks would be fired. Willie Smith testified substantially the same. In addition several people testified that such a rumor was circulating in the plant. Hicks did not specifically deny telling Smith this but did deny telling it to Butler. According to Hicks he "commented to him that (he) felt

like the black people should stick together. That it had been called to (his) attention that the blacks didn't stick together and if they didn't they wouldn't have any showing at Croft Metal." Hicks testified that there had been three layoffs during or shortly before the campaign involving mostly blacks. As a result of these layoffs employees came to talk to him about them telling him that "they felt if the Union lost . . . there wouldn't be any blacks left because of what would happen." His comment to the employees was that "Bancroft could lay off anybody he wanted and could hire anybody he wanted. They didn't have any protection on the job." On the occasion of one of these layoffs, according to Hicks, a meeting was arranged for the employees. At this meeting he told them "that seemingly the trend was . . . that the blacks were going to be laid off if they didn't stick together and try to get the plant organized to where they would have some protection, it could continue forever."

Another black, Enoch Williams, also testified that Hicks and Peavy came to him at his home where, among other things, they told him that if he did not join the Union and it came in "there wouldn't be anybody working there but the Joiners, and the colored working there but the Joiners, that I wouldn't have no job." This was not directly denied by Hicks. Levi Deer also testified that Hicks had asked him about a layoff—whether it was on account of a card or something like that. Deer said he didn't know. Hicks said, "You know I am trying to help the colored people . . . if you don't get the Union, they are going to lay off all the blacks and keep all the whites." This was denied by Hicks. According to Deer's further testimony, Peavy also told him the Company was going to get rid of all the blacks if the Union did not come in. Peavy did not testify.

In addition to the foregoing Respondent points to matters pertaining to the black procompany employee, J. C. Butler, as further indication of the Union's attempt to stir racial passions in the campaign. Thus there was a rumor going around the plant that Butler (who apparently was dealing with the Company for an automobile) would have the car given to him if the Company won the election; if the Company lost he would have to pay for it.[7]

In a speech at a union meeting by a Rev. Buie, another black, Buie was reported as having said that:

> It had been called to his attention that an employee was to be given a car to swing the black vote. He understood he was a soul brother and the part that hurt him so bad was that it would be a sold-out soul brother.

The further evidence shows that Butler was referred to as an Uncle Tom by union officials or agents, both to his face and to other employees. Whether Hicks was as discriminatory in his remark about the employment status of blacks *vis-a-vis* the union campaign as he testified is immaterial since the Board has held that a union's statement that if an employer wins the election, all blacks will be laid off so they must vote for the Union to save their jobs is not a reason for setting aside an election. *Kresge-Newark, Inc.*, 112 NLRB 819. As for the other aspects of Respondent's contention that racial passions were inflamed, I don't view an appeal to blacks to vote as a unit for the Union as an "appeal to racial passion and the inflammation of racial feelings" any more than an

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7. Respondent claims that Hicks, by asking several employees to check out this rumor for him, was in effect "making a misrepresentative and racially inflammatory statement to the employees."

appeal to any group red, white, yellow, black or mixed to vote for the Union—a legitimate and legal protected right.

Respondent further contends "that the Union's organizers attempted to inject ethnic as well as racial diversion among the employees" by somehow getting a rumor started in the plant that President Bancroft "was sending money to Israel to a Jewish relief fund" that should have been going to the employees as wages. There is not much in the evidence to show any ethnic flavor to the rumor. Willie Smith at first testified that he had heard that Bancroft was sending money to Japan. Asked if he was sure it was Japan, Smith thought it might be Italy or Japan. When he was asked if the contribution was "to any certain fund" Smith indicated that no fund was identified. Johnny Roy Morgan testified that "it seems like (he) did hear something about them sending a little bit of money to some country, and it should have been given to these people." In any event, there is no convincing evidence showing that the Union instigated this rumor.

Misrepresentations

Respondent claims that "the Union originated, emanated and perpetuated a . . . statement . . . that money Mr. Bancroft gave to a local hospital impliedly was coming from the employees' pay and should not have been done." Besides the fact that such a contribution had been made and was publicized in the local newspaper, there is no evidence that the statement was originated by the Union. Even if it had been it seems to me that it was a perfectly legitimate campaign statement. Certainly if Respondent's owner could make outside charitable contributions the employees could rightfully feel that instead of such largess the money should have gone to the employees in better wages. After all, "charity begins at home."

Respondent also cites as a misrepresentation by the Union the above discussed rumor of the contribution by Bancroft to an Israel relief fund. Two observations here: One, there is no evidence that the Union started or perpetuated this rumor. Two, there is no denial by Respondent that such a contribution was in fact made.[8]

Enoch Williams testified that he was told by Hicks and Peavy that if the employees went for the Union they would get a raise every 3 months and that if they did not go for the Union they would get no raises at all. This is the kind of material that the Board has repeatedly found to be within the ability of employees to evaluate purely as campaign propaganda and not detrimental to their free and uncoerced voice in an election.

Another rumor that was going around the plant was that Respondent was having union labels put on its products after leaving the plants. Again there is no showing that the Union was responsible for this rumor. Respondent would attribute responsibility for the rumor to the Union on the basis that the Union made no denial of its truth after informing a union meeting that the matter would be checked out for its authenticity. Whether the Union can be charged with responsibility for the rumor on this basis or not, I see no significant interference with the employees' free choice on the basis of it.

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8. About this matter Busby testified as follows:

Q. Now, I ask you, to your knowledge, as Vice President of the Company, do you have any knowledge of the Company sending money to Israel?

A. Not of the Company sending money to Israel, no, sir.

Q. Do you have any knowledge of Mr. Bancroft sending money to Israel, of your personal knowledge?

A. Not of my personal knowledge

A few days before the election the Union had the following announcement broadcast over the local radio:

> Attention Croft workers . . . attention Croft workers you are being misled about union security from Bancroft . . . the Iowa Supreme Court recently told workers such as yourself that if they wanted true job security, they had better join a union rather than rely on the so-called right to work law. Use your protected right by the federal government . . . vote yes for the UBC and you will see that better things are possible for you through organized labor . . . why is Bancroft spending thousands of dollars to keep you from obtaining a chance at a better future? Vote for your future . . . vote *yes* for the UBC . . . this message paid for by the United Brotherhood of Carpenters.

Elmo H. Busby was the only official of the Company to testify. He "was responsible for the Company's coordination of the campaign." He testified that he heard the broadcast and that the words "Iowa Supreme Court" sounded to him like "our Supreme Court." He reported the matter to the company attorney who made a check of the Mississippi Court reports but was unable to find such a decision. Although subpoenaed for a copy of the decision the Union had not been able to produce it by the close of the hearing. I indicated that I would close the hearing subject to receipt in evidence of a copy of the decision later. A copy of that decision, *Ludwig V. Armour and Company*, 158 N. W. 2d 646, was submitted after the hearing closed and is hereby received in evidence as General Counsel's Exhibit 12. Also received in evidence at this time as Respondent's Exhibit 11 is Respondent's letter of April 11, 1973 to me together with a copy of the same Iowa case attached.

In that case (decided in 1968) *Armour* had a "master agreement" with the United Packing House Food and Allied Workers, AFL-CIO, covering among others packing plants it was operating in West Point and Omaha, Nebraska. The master agreement contained a union shop provision valid by its terms only where permitted by state law. It also provided that in the event that *Armour* closed the plant and replaced it with another, "employees with seniority rights in the closed plant shall be offered employment at the replacement plant in order of seniority . . . The replacement plant shall be covered by the terms of the master agreement."

In late 1967 and early 1968 *Armour* closed the plants in West Point and Omaha. Thereafter *Armour* acquired an existing plant in the Sioux City, Iowa (determined under the master agreement to be a replacement plant), whose employees were not covered by a collective-bargaining agreement. Iowa has a right to work law.

When *Armour* employees from the closed plants decided to exercise their seniority under the master agreement and displaced the unrepresented employees of the former owner of the Sioux City plant, the displaced employees brought suit on the grounds that the result produced by the master agreement was *per se* illegal and in violation of the Iowa right to work law. The case was decided against them, the court holding that "this is job security by reason of length of service not union security by compulsory membership." The court also stated that the right to work law "prohibits management and unions from entering into agreements which would force an individual to join a union against his will in order to keep his job. It does not guarantee employees of a nonunion plant the same job security which might be obtained through legitimate collective bargaining." The

court also stated that "it is difficult to see how a provision which requires an opportunity to be given employees whether union or not to transfer under certain conditions, requires membership as a condition of employment."

Respondent contends that "there is nothing in this case, whatsoever, that can be interpreted according to (the Union's) radio spot announcement which announcement is a patent and a blatant misrepresentation of the case." According to Respondent "the case in its ultimate analysis, asserts a holding, in fact, which is directly contrary to the import of the radio announcement." I disagree. In my opinion Respondent misreads the case. I would not call this a misrepresentation by the Union. Nor would I call the Union characterization of the case as "recent" a misrepresentation as claimed by Respondent.

Another claimed "patent and blatant attempt by the petitioning Union to imply to the employees before the election in question, that the United States Government was endorsing the Carpenters Union" is alleged by Respondent by the following pamphlet (printed under a picture of Uncle Sam) distributed to the employees by the Union:

> My name is Uncle Sam. I don't work for Croft Metals, but I do represent each and every one of their employees, for it is my job to protect their rights as American citizens. A long time ago I found out that the individual worker was helpless in dealing with its employer. This is why I passed the NATIONAL LABOR RELATIONS ACT. The law which gives the working people the right to organize a UNION. This one law has helped more working people in more ways than any other dozen laws ever passed. But, if the people who work for Croft Metals don't want

> to use this right, which I have given them, then that is their right also . . . IT IS ALSO THEIR LOSS!
>
> COLOR ME - - - RED, WHITE AND BLUE!

As with the Iowa Supreme Court case I believe that Respondent misreads the Union's message in this pamphlet. Similarly, I believe Respondent has misinterpreted the Union's use of sample ballots as being contrary to Board policy.

The foregoing evidence, in my opinion, is not sufficient to establish that in an election of this size the employees were denied a free and uncoerced choice. Accordingly, I find that the Union was properly certified as a collective-bargaining agent of the employees in an appropriate unit and that by refusing to bargain with the Union, Respondent has violated and is violating Section 8(a)(1) and (5) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom, and upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if

an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., and Lemco Metal Products, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Southern Council of Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at Respondent's McComb, Magnolia, and Osyka, Mississippi, facilities, including plant clerical employees, interplant-drivers and leadmen and leadwomen; excluding over-the-road truckdrivers, office clerical employees, professional and technical employees, watchmen, and guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 20, 1971, the above-named labor organization has been and now is a certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 4, 1972, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining

representative of all the employees of Respondent in the appropriate unit, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[9]

ORDER

Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., Lemco Metal Products, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Southern Council of Industrial Workers,

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9. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

United Brotherhood of Carpenters & Joiners of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at Respondent's McComb, Magnolia, and Osyka, Mississippi, facilities, including plant clerical employees, interplant-drivers, and leadmen and leadwomen; excluding over-the-road truckdrivers, office clerical employees, professional and technical employees, watchmen, and guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its McComb and Osyka, Mississippi, facilities copy of the attached notice marked "Appendix."[10] Copies of said notice on forms provided by the Regional Director for Region 15 after being duly signed by Respondent's representative shall be posted by Respondent imme-

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10. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

diately upon receipt of thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 15, in writing within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ Eugene E. Dixon
Eugene E. Dixon
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Southern Council of Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the A[illegible].

WE WILL, upon request, bargain with the above-named Union, at the exclusive representative of all employ-

ees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed at Respondent's McComb, Magnolia, and Osyka, Mississippi, facilities, including plant clerical employees, interplant drivers, and leadmen and leadwomen; excluding over-the-road truckdrivers, office clerical employees, professional and technical employees, watchmen, and guards and supervisors as defined in the Act.

Bancroft Manufacturing Company, Inc.
Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., and Lemco Metal Products, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1001 Howard Ave, Plaza Tower, Suite 2700, New Orleans, La. 70113. Telephone (504) 527-6361.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BANCROFT MANUFACTURING COMPANY, INC., and Croft Aluminum Company, Inc., et al., Respondents.

No. 74-3052.

United States Court of Appeals, Fifth Circuit.

Oct. 10, 1975.

Application for Enforcement of an Order of the National Labor Relations Board (Mississippi Case).

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 23, 1975, 5 Cir., 1975, 516 F.2d 436).

Before GOLDBERG, CLARK and GEE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

GEE, Circuit Judge (specially concurring):

I think we have correctly upheld the Board's finding that the disputed remarks here were "in the nature of asides" that had virtually no inflammatory effect on the

black employees. 516 F.2d at 442, 443. Hence I join in denying rehearing. I have joined in the majority's reasoning, however, in the belief that it is consonant with my understanding of *Sewell*[1] and the dictates of § 9(c). A party whose agent makes a racially-oriented statement during a union election campaign should have the burden of proving it "temperate in tone," "truthful and germane."[2] Failing this, he must show that the statement had no significant effect on racial passions and the election result. If he cannot, the election should be set aside and a new one ordered. I stress effect rather than intent because a spontaneous utterance can arouse racial feeling while calculated efforts may fail. Only the successful propagandist need concern us; here the Board has found we do not deal with one.

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1. Sewell Mfg. Co.; 138 NLRB 66, 50 LRRM 1532 (1962).
2. *Id.* at 1535.